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No. 84-9

In The
Supreme Court of the United States
October Term, 1984

Massachusetts Mutual Life Insurance Company,
and Cecilia Stevenson,
Petitioners,
v.
Doris Russell,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICI CURIAE FOR AMERICAN COUNCIL OF LIFE INSURANCE AND HEALTH INSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, under the Employee Retirement Income Security Act, a fiduciary of an employee benefit plan may be held liable to a plan participant or beneficiary for punitive damages or extra-contractual compensatory relief for improper or untimely processing of benefit claims?

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INTERESTS OF THE AMICI [1]

The American Council of Life Insurance ("Council") represents the interests of 611 member life insurance companies including most of the major life insurers in the country. The Council's members account for ninety-nine percent of the insured private pension plan business in the United States. The Health Insurance Association of America ("HIAA") represents the interests of 327 member companies which write over eighty-five percent of the health insurance written by health insurance companies in the country, and the combined memberships of the HIAA and the Council represent over ninety percent

[1] Consent from counsel for both parties has been filed with the Clerk of this Court.

of the health insurance written by insurance companies in the United States.

The question of punitive damages awards for mishandling benefit claims poses grave concerns to members of the Council and the HIAA. Many members of the Council and the HIAA voluntarily provide benefits to their employees under plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, and they administer plans of other employers which are affected by that Act. Because the opinion below creates the possibility that the processing of a benefit claim may be accompanied by substantial, yet unpredictable, compensatory and punitive awards, the stability of the plans administered by members of the Council and the HIAA is seriously threatened. Members will be forced to bear the increased costs of defending actions seeking punitive relief and of processing unmeritorious claims to avoid such actions in the future. Faced with large and unpredictable punitive awards, members and other employers may be unwilling, or unable, to increase contributions to employee benefit plans, or to establish new plans, due to the increased liabilities associated with such plans.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 722 F.2d 482. The opinion of the United States District Court for the Central District of California is not reported. It is set forth at pp. 26a-30a in the Appendix to the Petition.

JURISDICTION

The judgment below was entered on December 16, 1983. On July 3, 1984, petitioners filed a timely Petition for a Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Ninth Circuit. On October 1, 1984, this Court granted

the Petition. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 502(a) of the Employee Retirement Income Security Act of 1974 ("ERISA") provides, in pertinent part, that:

> (a) A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a) (1982).

Section 409(a) of ERISA provides, in relevant part, that:

> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary,

and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C. § 1109(a) (1982).

STATEMENT

Massachusetts Mutual Life Insurance Company ("Mutual") provides disability benefits to its employees under two plans: the Employee Salary Continuance Plan and the Employee Disability Plan. The Employee Salary Continuance Plan provides short-term salary continuance benefits based upon a percentage of an employee's salary. The Employee Disability Plan provides disability benefits when all benefits under the Employee Salary Continuance Plan are exhausted, and when an employee is disabled for a minimum of eight weeks. Both plans are provided out of company assets and at no cost to Mutual's employees.[2]

The respondent here, an employee of Mutual, took a leave of absence in May, 1979, due to a back ailment. Respondent submitted a claim for disability benefits, and Mutual began paying salary continuance benefits under its Employee Salary Continuance Plan. Payment of these benefits, however, was terminated in October, 1979, after Mutual's Disability Committee received an orthopedic specialist's report which indicated that respondent was not physically disabled.

Respondent took an internal appeal of Mutual's decision to terminate her salary continuance benefits. In a letter dated November 27, 1979, respondent submitted to Mutual's Plan Administrator additional evidence of her disability, including a report from respondent's psychiatrist indicating that she was suffering from a psychosomatic disability. This letter was treated as a formal appeal and was referred to the Disability Committee. At the request of this Committee, respondent underwent an independent psychiatric examination, after which the examining physician concluded that respondent was indeed temporarily disabled due to psychiatric illness. Based upon this information, Mutual resumed paying salary continuance benefits to the respondent in March, 1980. All accrued salary continuance benefits owed to the respondent were promptly paid by Mutual, and respondent continues to receive long-term disability benefits under Mutual's disability plan.

[2] The Employee Salary Continuance Plan and the Employee Disability Plan are welfare benefit plans subject to the Employee Retirement Income Security Act of 1974 ("ERISA" or "Act"), 29 U.S.C. §§ 1001 *et seq.*

Respondent initiated this action in a California Superior Court to recover damages which she claims were caused by Mutual's alleged improper handling of her claim for benefits. In her complaint, respondent asserted various state law causes of action, including breach of the covenant of good faith and fair dealing under California law, breach of fiduciary duty, and intentional and negligent infliction of emotional distress. Respondent sought both compensatory and punitive damages. Mutual removed the action to the United States District Court for the Central District of California on grounds that respondent's causes of action "related to" her benefits and were thus preempted by ERISA. *See* 29 U.S.C. § 1144.

The Proceedings Below

After removal to the district court, Mutual moved for summary judgment in its favor as to all claims, and this was granted. On appeal, a panel of the Ninth Circuit agreed with the district court that ERISA preempted the state law causes of action based upon Mutual's alleged mishandling of respondent's disability claims. The court of appeals ruled, however, that sections 502(a)(2) and 409(a) of ERISA afford plan beneficiaries a federal

right to bring an action against plan fiduciaries for breach of their duties based upon an alleged improper handling of benefit claims, and that such beneficiaries are entitled to recover compensatory damages, not limited by the amount of any benefit loss, which are proximately caused by the breach. The court of appeals further held that punitive damages are recoverable under ERISA, saying that section 409 confers broad discretion upon courts in fashioning appropriate relief.

SUMMARY OF ARGUMENT

The relatively simple claim for benefits initiated by the respondent in this case, a claim which was effectively resolved by internal procedures, has mushroomed into a case of wide significance. As it has now developed, this case involves the propriety of extra-contractual relief, and of punitive damages, in actions brought under ERISA.

In concluding that punitive damages are recoverable under ERISA, the Ninth Circuit misconstrued the language of ERISA and reached a result at odds with important policies underlying the Act. The terms of sections 502(a) and 409(a) of ERISA indicate that recovery for breaches of fiduciary obligations inures to the benefit of the plan itself, and not to beneficiaries of the plan. Moreover, the types of relief sought in this case—punitive damages and extra-contractual compensatory damages—are plainly outside the scope of civil remedies accorded to plan beneficiaries by Congress. Nowhere in ERISA's broad enforcement scheme did Congress state or imply that punitive damages, which are neither equitable nor remedial, could be awarded as an additional remedy under ERISA.

The Ninth Circuit's decision is also at odds with the policies underlying the Act. The decision to permit punitive damages awards in ERISA actions effectively undermines the intent of Congress to provide uniformity in the administration of benefit plans. The Ninth Circuit's decision subjects interstate fiduciaries to differing liabilities depending upon the situs of a plan, and breeds uncertainty and inconsistency in the enforcement of ERISA.

Moreover, contrary to Congress' desire to encourage the creation and expansion of employee benefit plans, the Ninth Circuit's decision effectively deters the development of such plans. By adding punitive damages to the array of remedies available to beneficiaries and participants, the decision below adds substantial, but unquantifiable, costs to the administration of benefit plans. The decision forces employers to incur increased costs in processing even the most frivolous of claims, and to incur the risk of punitive damages in litigating these claims.

The injection of punitive damages into the enforcement scheme of ERISA poses significant problems to employers who voluntarily provide benefit plans and who will be forced to defend against numerous actions by disgruntled beneficiaries seeking substantial punitive awards. In the absence of meaningful standards for assessing punitive damages, the prospect that punitive damages will be assessed against fiduciaries in an arbitrary manner, and in excessive amounts, wholly disproportionate to any injuries suffered, becomes quite real. The law of punitive damages in general, and the Ninth Circuit's decision in particular, establish no adequate procedural safeguards to protect against such unfair awards, and this raises serious constitutional questions.

ARGUMENT

I. ERISA SHOULD NOT BE CONSTRUED TO PROVIDE A CAUSE OF ACTION FOR PUNITIVE DAMAGES AND EXTRA-CONTRACTUAL RELIEF

A. The Ninth Circuit's Decision Is Inconsistent with the Language of ERISA

The issue presented in this case is whether the Employee Retirement Income Security Act permits a plan participant or beneficiary to recover punitive damages and extra-contractual relief from a plan fiduciary for an alleged mishandling of a benefit claim. While the lower federal courts are divided on the issue of the availability of punitive damages under ERISA, a substantial number of courts has concluded that such damages are not recoverable.[3]

The court below held to the contrary.[4] In reaching this result, the court essentially legislated a remedy which Congress did not prescribe when it enacted ERISA.

The decision below finds no basis in the language of ERISA.[5] Section 502(a)(2) of ERISA authorizes the Secretary of Labor, participants, beneficiaries and fiduciaries to institute civil actions for "appropriate relief" under section 409—the fiduciary liability provision of ERISA. *See* 29 U.S.C. §§ 1132(a)(2) and 1109. In section 409, Congress expressly articulated the type of relief it deemed to be appropriate for breaches of fiduciary duties. Specifically, section 409(a) provides that a fiduciary who fails to meet its duties under the Act—

> shall be personally liable to make good *to such plan* any losses to the plan resulting from each such breach, and to restore *to such plan* any profits of such fiduciary which have been made through use of assets of the plan . . . , and shall be subject *to such other equitable or remedial relief* as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C. § 1109(a) (emphasis added). In accordance with the plain terms of the statute, therefore, any recovery of appropriate "equitable or remedial relief" under

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[3] *See, e.g., Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 968 and 1084 (1981) (dictum); *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820 (7th Cir. 1984) (dictum); *Sheahan v. Leahy et al.*, No. 84-1833C(B) (E.D. Mo. August 23, 1984); *Zittrouer v. UARCO Incorporated Group Benefit Plan*, 582 F. Supp. 1471 (N.D. Ga. 1984); *Meyer v. Phillip Morris, Inc.*, 575 F. Supp. 1232 (E.D. Mo. 1983); *Hechenberger v. Western Electric Co.*, 570 F. Supp. 820 (E.D. Mo. 1983); *Whitaker v. Texaco, Inc.*, 566 F. Supp. 745 (N.D. Ga. 1983); *Meyer v. Phillip Morris, Inc.*, 569 F. Supp. 1510 (E.D. Mo. 1983); *Maxfield v. Central States*, 559 F. Supp. 158 (N.D. Ill. 1982); *Diano v. Central States*, 551 F. Supp. 861 (N.D. Ohio 1982); *Hoskins v. Retirement Plan*, No. 78C3670 (N.D. Ill. 1982); *Calhoun v. Falstaff Brewing Corp.*, 478 F. Supp. 357 (E.D. Mo. 1979); and *Hurn v. Retirement Fund Trust*, 424 F. Supp. 80 (C.D. Cal. 1976).

[4] The Ninth Circuit has since reaffirmed its conclusion that ERISA permits awards of punitive damages. *Winterrowd v. David Freedman and Company*, 724 F.2d 823 (9th Cir. 1984). Several federal district courts have similarly concluded that punitive damages are recoverable under various provisions of ERISA. *See Kann v. Keystone Resources, Inc.*, 575 F. Supp. 1084 (W.D. Pa. 1983); *Jiminez v. Pioneer Diecasters*, 549 F. Supp. 677 (C.D. Cal. 1982); *Free v. Gilbert Hodgman, Inc.*, 3 Empl. Ben. Cas. (BNA) 1010 (N.D. Ill. 1982); *Bobo v. 1950 Pension Plan*, 548 F. Supp. 623 (W.D.N.Y. 1982); *Eaton v. D'Amato*, 581 F. Supp. 743 (D.D.C. 1980); and *Bittner v. Sadoff & Rudoy Industries*, 490 F. Supp. 534 (E.D. Wis. 1980).

[5] As this Court has said, "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." *Central Trust Co. v. Official Creditors' Committee*, 454 U.S. 354, 359-60 (1982), *quoting Caminetti v. United States*, 242 U.S. 470, 485 (1917); *see also American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982); *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

section 409 accrues solely to the benefit of the plan, and not directly to plan beneficiaries.[6]

Contrary to the opinion of the court below, the type of "other equitable or remedial relief" contemplated by section 409 does not encompass an award of punitive damages to a plan participant or beneficiary. The very terms of section 409 remove any doubt as to the type of relief Congress intended to authorize when it enacted ERISA. Punitive damages are not a form of "equitable" relief, but are instead a form of relief developed in the common law.[7] Nor are punitive damages "remedial" in nature.

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[6] This conclusion finds support in the legislative history of ERISA. Throughout its deliberations, Congress repeatedly stated that an errant fiduciary would be personally liable "to the plan". *See* H. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 320 (1974) (fiduciary is personally liable for any losses to the plan resulting from a breach of its duties); S. Rep. No. 383, 93d Cong., 1st Sess. 105 (1973) (fiduciary must reimburse the plan for any losses resulting from a breach of fiduciary duties and must restore to the plan any profits made with plan assets); S. Rep. No. 127, 93d Cong., 1st Sess. 33 (1973) (fiduciary must reimburse fund for any losses attributable to a breach of its duties).

In contrast to Congress' decision to limit recovery under section 409 to the plan itself, Congress provided several methods for recovery by a participant or beneficiary on his or her own behalf. Specifically, in section 502(a)(1)(B), Congress empowered beneficiaries and participants to sue to recover benefits due under the plan, to enforce their rights under the plan, or to clarify their rights to future benefits. *See* 29 U.S.C. § 1132(a)(1)(B).

[7] *See, e.g., Curtis v. Loether*, 415 U.S. 189, 196 (1974); *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1364 (11th Cir. 1982); *Whitaker v. Texaco, Inc.*, 566 F. Supp. 745, 751 (N.D. Ga. 1983). Congress apparently knew the difference between "legal" and "equitable" remedies when it enacted ERISA. Congress considered, but rejected, an effort to incorporate into ERISA's fiduciary liability provision the option of seeking "legal" relief in addition to equitable relief. As passed by the Senate, H.R. 2 provided that a participant could bring "[c]ivil actions for appropriate relief, legal and equitable, to redress or restrain a breach" of fiduciary duties. *See* H.R. 2, *reprinted in* Legislative History of the Employee Retirement Income Security Act of 1974, Vol. III at 3816 (1976); *see also* S.4, *reprinted in* Legislative History of the Employee Retire-

Punitive damages are designed to *punish* and *deter* reprehensible conduct, not to *remedy* any wrong suffered. In cases involving statutes which, like ERISA, are essentially remedial in nature, this Court has refused to permit awards of punitive damages. *See International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979) (Railway Labor Act); *Republic Steel Corporation v. NLRB*, 311 U.S. 7 (1940) (National Labor Relations Act). Accordingly, had Congress desired to include punitive damages within the array of remedies provided in sections 502(a) and 409, it would certainly have employed words other than "equitable" or "remedial" to achieve that result.

That punitive damages are not "equitable or remedial relief" within the meaning of section 409 is further shown by Congress' own articulation of the type of "other" relief which it deemed to be appropriate in actions under that provision. Consistent with the array of non-legal forms of relief provided in sections 502(a) and 409, Congress expressly provided that removal of a fiduciary would be an appropriate form of "other" relief under section 409. *See* 29 U.S.C. § 1109(a). Thus, to conclude that ERISA permits an award of punitive damages for a breach of fiduciary duties—an award which is neither equitable nor remedial and which is inconsistent with the types of non-legal relief specifically provided by Congress—would be to distort the plain words and intent of section 409(a).

B. The Decision Below Is Inconsistent with the Legislative History of ERISA and Undermines Important Policies Embodied in the Act

Nothing in the legislative history of ERISA alters the conclusion that the Act does not provide for awards of

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ment Income Security Act of 1974, Vol. I at 579 (1976). As passed by the House, and ultimately adopted by the conferees, H.R. 2 contained no reference to "legal" relief, but provided merely for appropriate "equitable or remedial relief." *Id.*, Vol. III at 3953 and 4345.

punitive damages in actions for breaches of fiduciary obligations. In none of its deliberations did Congress state or imply that punitive damages would be available in civil enforcement actions under ERISA. In fact, the conclusion that punitive damages are available under ERISA is wholly inconsistent with fundamental policies underlying the Act.

Construing section 409 to permit punitive damages to be assessed against a plan fiduciary distorts the intent of Congress to establish a uniform scheme for administering employee benefit plans. If punitive damages are allowed in benefit plan cases, as the court below has held, fiduciaries of plans will be subjected to the capricious and haphazard application of punitive damages, according to the practices of the several states, thus creating diversity where Congress intended to establish uniformity.[8] Congress could not have intended to inject such an element of uncertainty into ERISA's enforcement scheme. In fact, in describing the fiduciary standards imposed by the proposed legislation, Congress stated:

> [A] fiduciary standard embodied in Federal legislation is considered desirable because it will bring a measure of uniformity in an area where decisions under the same set of facts may differ from state to state. . . . [I]t is evident that the operations of employee benefit plans are increasingly interstate. The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws.

H.R. Rep. No. 533, 93d Cong., 1st Sess. 12 (1973).

The decision below strikes at yet another policy firmly embedded in ERISA. Throughout its deliberations, Congress carefully weighed the rights of plan beneficiaries against the interests of employers in administering adequate and cost-efficient plans. While endeavoring to provide effective protection to beneficiaries of pension plans, Congress was "constrained to recognize the voluntary nature of private" plans and undertook to weigh "[t]he relative improvements required by this Act . . . against the additional burdens to be placed on the system." H.R. Rep. No. 533, 93d Cong., 1st Sess. 1 (1973). Recognizing that increases in administrative costs would discourage the establishment of private benefit plans, and thus defeat important public policy objectives, Congress carefully sought to minimize the costs to be placed upon employers by ERISA. As Senator Nelson stated during floor debate on the Conference Report:

> In all its deliberations and decisions, Congress was acutely aware that under our voluntary pension system the cost of financing pension plans is an important factor in determining whether a pension plan will be adopted. Unduly large increases in cost can impede the progress of the private pension system. For this reason, . . . Congress tried to adopt provisions which strike a balance between providing a meaningful protection for the employees and keeping costs within reasonable limits for employers.

102 Cong. Rec. S15,762 (daily ed. Aug. 22, 1974); *see also* 102 Cong. Rec. H1149 (daily ed. Feb. 26, 1974) (remarks of Representative Ullman).[9]

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[8] The lack of standards for and arbitrary application of punitive damages are discussed in more detail in Part III of this brief, *infra* pp. 17-27.

[9] The Legislative history of ERISA provides clear evidence of the intent of Congress to avoid burdening employers with unreasonable costs. *See, e.g.*, 102 Cong. Rec. H1149 (daily ed. Feb. 26, 1974) ("since these plans are voluntary on the part of the employer and both the institution of new pension plans and increases in benefits depend upon employer willingness to establish or expand a plan, it is necessary to take into account additional costs from the standpoint of the employer") (remarks of Representative Ullman); 102 Cong. Rec. H1168 (daily ed. Feb. 26, 1974) ("our primary concern was in tightening the existing standards for qualified plans while at the same time continuing to encourage voluntary participation in such plans. As a result, the committee found it necessary to strike a

The decision below unsettles this delicate balance of costs and benefits. By exposing employers who voluntarily establish employee benefit plans to substantial, yet unpredictable, extra-contractual and punitive damages awards, the Ninth Circuit's decision significantly increases the costs Congress carefully sought to minimize when it enacted ERISA. Faced with the increased liabilities associated with employee benefit plans, employers will be discouraged from establishing new plans. Moreover, confronted with the proliferation of substantial and unpredictable punitive damages awards, employers may be unwilling, or unable, to increase contributions to existing benefit plans. The decision below creates the real possibility that funds which an employer might normally channel into an employee benefit plan will instead be expended to meet the increased costs of processing or paying unmeritorious benefit claims and of defending against potentially frivolous suits which threaten largely unpredictable results. By increasing the costs of administering employee benefit plans, and thus discouraging their development, the decision below achieves precisely the result which Congress carefully sought to avoid when it enacted ERISA.

II. THE DECISION BELOW CONTRAVENES THIS COURT'S ADMONITION AGAINST IMPLICATION OF REMEDIES

"It is an elemental canon of statutory construction that where a statute expressly provides a particular

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very delicate balance between what we felt companies with pension plans should do and what they were willing to do, since no employer can be compelled to offer any plan at all") (remarks of Representative Rostenkowski); 102 Cong. Rec. S15,753-754 (daily ed. Aug. 22, 1974) ("We who have worked intimately on this legislation have always kept in mind that private pension plans depend for their very existence on voluntary action. We know that new pension plans will not be adopted and that existing plans will not be expanded and liberalized if the costs are made overly burdensome, particularly for employers who generally foot most of the bill") (remarks of Senator Long).

remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979); *see also Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 14-15 (1981). Particularly where Congress has established a comprehensive scheme for enforcing a statute, this Court has refused to assume that Congress meant to authorize additional remedies by judicial implication. *See Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U.S. 77, 97 (1981).

To protect employee rights and preserve the integrity of employee benefit plans, Congress incorporated into ERISA a comprehensive enforcement scheme. Thus, plan participants and beneficiaries are expressly given several means of redressing violations of the Act, including the right to sue to recover benefits, to enforce or clarify rights under a plan, to enjoin acts or practices which violate the Act, and to redress breaches of fiduciary duties. *See* 29 U.S.C. § 1132(a)(1-3). In addition to these civil remedies, Congress made specific provision to *punish* and *deter* by imposing criminal penalties against persons who willfully violate the provisions of the Act. Specifically, section 501 imposes a fine of up to $5,000 upon individuals, or up to $10,000 upon corporations, who willfully violate the reporting and disclosure provisions of the Act. *See* 29 U.S.C. § 1131. In addition, section 511 provides that any person who willfully interferes with a beneficiary's exercise of rights under the Act will be fined $10,000 or imprisoned for up to one year, or both. *See* 29 U.S.C. § 1141.

Despite the numerous express remedies provided in ERISA, the court below erroneously concluded that Congress intended to afford plan beneficiaries yet another form of relief—extra-contractual and punitive damages. Yet nowhere in its comprehensive enforcement scheme did Congress ever mention punitive and extra-contractual damages. In fact, without suggesting that any broader

relief would be appropriate, Congress provided that a participant or beneficiary could sue "to recover *benefits due to him* under the terms of his plan." 29 U.S.C. § 1132(a)(1)(B) (emphasis added).

Significantly, this Court has hesitated to award punitive damages where Congress has not provided for such awards. In *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979), this Court held that punitive damages could not be assessed under the Railway Labor Act against a union for a breach of its duty of fair representation. The cause of action in *Foust* was judicially implied, and, accordingly, Congress had not specified the type of remedial relief available in fair representation suits. In the absence of clear congressional guidance, and in light of the remedial nature of the statute, this Court refused to permit punitive damages to be awarded. It noted that the benefits of increasing a union's willingness to pursue individual complaints due to the threat of punitive damages were offset by the possibility that punitive awards would upset the balance of individual and collective interests and could impair the financial stability of unions.[10]

In enacting ERISA, Congress struck a balance between the rights of employees and the interests of employers, and devised an enforcement scheme which would ensure that the balance is maintained. Congress expressly enumerated the remedies it considered necessary to redress violations of ERISA. The absence of punitive and extra-

[10] Similarly, this and other federal courts have refused to permit punitive damages to be awarded in actions brought under analogous statutes, including certain actions under the National Labor Relations Act, *see Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-12 (1940) (unfair labor practices); *Alexander v. International Union of Operating Engineers*, 624 F.2d 1235 (5th Cir. 1980) (breach of duty of fair representation); section 303 of the Labor Management Relations Act, *see Local 20, Teamsters v. Morton*, 377 U.S. 252, 260-61 (1964); and Title VII of the Civil Rights Act of 1964, *see, e.g., Walker v. Ford Motor Co.*, 684 F.2d 1355 (11th Cir. 1982).

contractual damages from these remedies is therefore significant.[11] Had Congress intended to provide for punitive damages in addition to the remedies provided in sections 502(a) and 409, it could readily have done so.[12]

III. THE DECISION BELOW FAILS TO ESTABLISH WORKABLE AND CONSTITUTIONALLY SOUND STANDARDS FOR ASSESSING PUNITIVE DAMAGES

Punitive damages are not "a favorite of the law." *See Smith v. Wade*, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting), and cases there cited. They are an historical anomaly, transplanted in neo-natal state to American soil from eighteenth century England and nurtured by early American courts which employed punitive damages to compensate victims in small amounts for intangible injuries which the law otherwise did not recognize.[13]

[11] Indeed, the United States District Court for the Northern District of Illinois has refused to entertain an action under ERISA for compensatory and punitive damages based upon an allegedly wrongful discharge, stating:

> A comprehensive scheme of remedies is provided by ERISA, which demonstrates Congress' intention to bar additional common law remedies. In light of such congressional intent, this court may not create new remedies that might upset carefully considered legislative programs. *See Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U.S. at 97.

Wilke v. Morton Thiokol, Inc., No. 84 C 1352 (N.D. Ill. June 26, 1984).

[12] Congress clearly knows how to provide for punitive damages where it deems them to be appropriate. *See, e.g.*, Consumer Credit Protection Act § 616, 15 U.S.C. § 1681n (1982) (punitive damages); Omnibus Crime Control and Safe Streets Act of 1968 § 802, 18 U.S.C. § 2520 (1982) (punitive damages); Civil Rights Act of 1968 § 812(c), 42 U.S.C. § 3612(c) (1976) (punitive damages); Clayton Act § 4, 15 U.S.C. § 15 (1976) (treble damages).

[13] The doctrine of punitive damages was recognized in 1851 by this Court in a modest way in *Day v. Woodworth*, 13 Howard 363 (1851). In a passage considered to be the foundation of punitive

Punitive damages were thus awarded in small sums to victims of tortious conduct, such as libel or slander, where actual damages for humiliation or affronts to dignity were largely unascertainable. *See* Nelson, *Punishment for Profit: An Examination of the Punitive Damage Award in Strict Liability*, 18 Forum 377, 380-81 (1983).

From this small beginning, punitive damages have recently branched far beyond their origins in insult torts and have been stretched beyond the limits of their validity.[14] With the expansion of compensatory damages to include intangible injuries such as pain and suffering and humiliation, much of the historical justification for punitive damages has disappeared. The anomaly nevertheless persists. Seizing upon the retributive and deterrent functions served by punitive damages, many courts have expanded the shapeless doctrine, resting upon a nebulous base at best, and have awarded punitive damages in cases outside the traditional tort areas and in large and essentially arbitrary amounts bearing no relation to the actual harm suffered.

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damages in American law, Justice Grier, writing for the Court, stated (13 Howard at 371):

> It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. . . . In many civil actions, such as libel, slander, seduction, &c., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory.

[14] As has been well said in another context, "these laws are being extrapolated to places where they no longer apply." Bernstein, "Dread Singularities" (Book Review), New York Times Book Review, April 25, 1982, p. 10.

The expansion of this doctrine beyond the traditional tort areas has brought with it an explosive increase in the size and frequency of punitive damages awards in product liability cases. Prior to 1970, apparently only one reported appellate court decision had upheld an award of punitive damages in such a case. *See* Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 271 n.6 (1983).[15] Since that time, however, cases in which courts have awarded punitive damages in excess of $1 million have been frequent.[16] And there must have been many hundreds of

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[15] That decision, *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App.2d 689, 60 Cal. Rptr. 398 (1967), involved a jury award of $250,000 for a drug company's failure to conduct proper tests and to provide adequate warnings on a cholesterol-inhibiting drug.

[16] Heralding the proliferation of punitive damages awards in product liability cases, a jury in 1981 made an award of $125 million in punitive damages (which was later remitted to $3.5 million) against Ford Motor Company after a car it had marketed with a fuel system found to be defective exploded in a collision. *See Grimshaw v. Ford Motor Co.*, 119 Cal. App.3d 757, 174 Cal. Rptr. 348 (1981). Numerous other cases evidence the seemingly uncontrolled growth in both the size and frequency of punitive damages awards. *See, e.g., Ford Motor Company v. Stubblefield*, No. 67758 (Ga. Ct. App. June 13, 1984) ($8 million dollar punitive damages award upheld); *Dorsey v. Honda Motor Co.*, 655 F.2d 650 (5th Cir. 1981) (court reinstated jury award for $5 million in punitive damages), *modified on other grounds*, 670 F.2d 21 (5th Cir.), *cert. denied*, 459 U.S. 880 (1982); *Airco Inc. v. Simmons First National Bank*, 276 Ark. 486, 638 S.W.2d 660 (1982) (court affirmed jury award of $3 million in punitive damages); *Hasson v. Ford Motor Company*, 32 Cal.3d 388, 185 Cal. Rptr. 654, 650 P.2d 1171 (1982) ($4 million award in punitive damages upheld), *petition dismissed*, 459 U.S. 1190 (1983); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn.), *cert. denied*, 449 U.S. 921 (1980) (jury award of $1 million in punitive damages upheld); *Leichtamer v. American Motors Corp.*, 67 Ohio St.2d 456, 424 N.E.2d 568 (1981) (award of $1.1 million in punitive damages upheld); *Maxey v. Freightliner Corporation*, 450 F. Supp. 955 (N.D. Tex. 1978) (jury award of $10 million in punitive damages overturned), *aff'd*, 623 F.2d 395 (5th Cir. 1980), *vacated and re-*

cases in which punitive damages in smaller amounts have been routinely allowed, resulting in a very large aggregate of such awards. *Cf.* Judge Friendly's opinion in *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967).

Staggering sums have also been awarded as punitive damages in mass tort cases[17] as well as in insurance cases. Juries (often in California and Arizona within the area of the Ninth Circuit) have awarded large sums as punitive damages against insurance companies, ranging

manded upon rehearing, 665 F.2d 1367 (5th Cir. 1982), *vacated in part and affirmed in part,* 722 F.2d 1238 (5th Cir. 1984); *Sturm, Ruger & Co. v. Day,* 594 P.2d 38 (Alaska 1979), *cert. denied,* 454 U.S. 894 (1981) (court held jury award of $2,895,000 in punitive damages to be excessive); *Ford Motor Company v. Nowak,* 638 S.W.2d 582 (Tex. Ct. App. 1982) (court affirmed jury award of $4 million in punitive damages).

[17] *See* Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control,* 52 Fordham L. Rev. 37 (1983). Perhaps the most revealing examples of the growth of punitive damages in the mass tort area are cases involving the Johns-Manville Corporation, a manufacturer of asbestos products, and the A.H. Robins Company, the manufacturer of the Dalkon Shield. As of this year, over 14,000 cases were reportedly pending against Johns-Manville, with prayers for relief totaling over $50 billion. Over 9,300 of these suits contained prayers for punitive relief. *See Jackson v. Johns-Manville Sales Corporation,* 727 F.2d 506, 524 (5th Cir. 1984) (applying Mississippi law, court disallowed jury award of punitive damages totaling $625,000); *see also Hansen v. Johns-Manville Products Corporation,* 734 F.2d 1036 (5th Cir. 1984) (applying Texas law, court remitted $1 million punitive damages award to $300,000). Similarly, as of 1982, approximately 1600 suits were pending against the A.H. Robins Company, with prayers for punitive damages totaling over $2.35 billion. *See* Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products,* 49 U. of Chi. L. Rev. 1, 53 (1982). Some of these claims have recently been translated into multi-million dollar punitive awards. *See, e.g., Worsham v. A.H. Robins Co.*, No. 82-5935 (11th Cir. June 18, 1984) (upholding $1 million award of punitive damages); *Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984) ($6.2 million in punitive damages upheld).

from $1 million in *Garvey v. State Farm and Casualty Co.*, No. 760226 (S.F. Super. Ct. Feb. 18, 1982), and $2 million in *Linthicum v. Nationwide Life Ins. Co.*, No. 446562 (Maricopa Co. Dec. 15, 1982), to $8 million in *Frazier v. Metropolitan Insurance Co.*, No. C233971 (L.A. Super Ct. March 14, 1983) and $10 million in *Trus Joist Corp. v. Safeco Insurance Co.*, No. C366678 (Maricopa Co. March 21, 1983). Although some similar awards have not survived judicial scrutiny,[18] many have, posing serious problems in the insurance industry.[19]

The problems posed by the magnitude of punitive damages awards, and by the frequency with which they are assessed, are especially serious in the conduct of the insurance business, which depends heavily on the ability to make careful and exact computations of risks. These difficulties are greatly exacerbated by the vagueness of

[18] *See San Jose Production Credit Association v. Old Republic Life Insurance Co.*, 723 F.2d 700 (9th Cir. 1984) (court reversed jury award of $500,000 in punitive damages for breach of implied covenant of good faith and fair dealing); *Egan v. Mutual of Omaha,* 24 Cal. 3d 809, 157 Cal. Rptr. 482, 598 P.2d 452 (1979), *appeal dismissed,* 445 U.S. 912 (1980) (jury award of $5 million in punitive damages against insurer for failure to conduct proper investigation of its insured's claim held to be excessive in that award was 40 times larger than the compensatory damages award and represented two and one-half months of the insurer's net income in 1973 as well as more than seven months of its income in 1974).

[19] *See, e.g., Dempsey v. Auto Owners Insurance Co.*, 717 F.2d 556 (11th Cir. 1983) (in action seeking recovery of fire loss under a policy, for bad faith refusal to pay, and for punitive damages, court held jury award of $3.1 million to be excessive and remanded with directions to require a remittitur to $1.5 million); *Sparks v. Republic National Life Ins. Co.*, 132 Ariz. 529, 647 P.2d 1127, *cert. denied,* 459 U.S. 1070 (1982) ($3 million award of punitive damages for insurer's tortious termination of insurance benefits upheld); *Neal v. Farmers Insurance Exchange,* 21 Cal.3d 910, 148 Cal. Rptr. 389, 582 P.2d 980 (1978) (court upheld jury award of punitive damages, as reduced to $740,000 by the trial court, for insurer's "bad faith" refusal to settle).

standards for determining when, and in what amounts, punitive damages should be awarded. Despite the unprecedented growth in the size and number of punitive damages awards, there has been no concurrent development or refinement of substantive standards to guide courts in assessing these damages.

Punitive damages have been awarded to punish and deter conduct which ranges from "malice" to some degree of "negligence," and a multitude of necessarily overlapping and somewhat redundant terms have been employed to support awards of punitive damages against a defendant whose conduct lies somewhere in between.[20]

[20] *See Dempsey v. Auto Owners Insurance Company*, 717 F.2d 556, 561 (11th Cir. 1983) (applying Alabama's standard requiring "maliciousness, willfulness, or wanton and reckless disregard for the rights of others," court upheld punitive award as remitted to $1.5 million); *Egan v. Mutual of Omaha Insurance Company*, 24 Cal.3d 809, 157 Cal. Rptr. 482, 598 P.2d 452, 458 (1979) (finding that defendant "acted maliciously, with an intent to oppress, and in conscious disregard of the rights of its insured," but deeming $5 million punitive award to be excessive), *appeal dismissed*, 445 U.S. 912 (1980); *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 219 (Colo. 1984) (punitive award upheld where injury "attended by circumstances of fraud" or by a "wanton and reckless disregard" of the rights of the plaintiff); *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506, 526 (5th Cir. 1984) (applying Mississippi's requirement of a showing of "wanton, gross, or intentionally wrongful conduct," court disallowed punitive damages award); *Airco Inc. v. Simmons First National Bank*, 276 Ark. 486, 638 S.W.2d 660, 663 (1982) (defendant's reckless disregard of the consequences held to warrant $3 million punitive award); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 739 (Minn.), *cert. denied*, 449 U.S. 921 (1980) (punitive award of $1 million supported by standard of "willful, wanton and/or malicious disregard of the rights of others"); *Leichtamer v. American Motors Corp.*, 67 Ohio St.2d 456, 424 N.E.2d 568, 579 (1981) (punitive damages may be awarded in cases involving fraud, malice or insult, and intentional, reckless, wanton, willful and gross acts which cause injury may constitute malice); *Maxey v. Freightliner Corporation*, 450 F. Supp. 955, 963 (N.D. Tex. 1978) (punitive damages may be awarded if defendant acts "intentionally or willfully, or with a degree of 'gross negligence' which approximates a fixed purpose to bring about the injury"), *aff'd*, 623 F.2d 395 (5th Cir. 1980), *vacated and remanded upon rehearing*, 665 F.2d 1367 (5th Cir. 1982), *vacated in part and affirmed in part*, 722 F.2d 1238 (5th Cir. 1984); *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 46 (Alaska 1979), *cert. denied*, 454 U.S. 894 (1981) (even though punitive damages were warranted on the basis of defendant's "reckless indifference to rights of others, and conscious action in deliberate disregard of them," jury award was held to be excessive); *Wangen v. Ford Motor Company*, 97 Wis.2d 260, 294 N.W.2d 437, 442 (1980) (punitive damages may be awarded upon a showing of malice, ill-will, or wanton, willful or reckless disregard of plaintiff's rights); *Hansen v. Johns-Manville Products Corp.*, 734 F.2d 1036, 1043 (5th Cir. 1984) (punitive damages awarded on the basis of Texas' "gross negligence" standard); *Campus Sweater & Sports Wear Co. v. M.B. Kahn Construction Co.*, 515 F. Supp. 64, 104 (D.S.C. 1979) (punitive damages upheld on basis of South Carolina's standard of negligence which is "so gross or reckless of consequences as to imply or assume the nature of a wantonness, willfulness or recklessness"), *aff'd without opinion*, 644 F.2d 877 (4th Cir. 1981). *See also* Meyers and Barrus, *Punitive Damages in Product Liability Cases: A Survey*, 51 Ins. Counsel J. 212 (April 1984).

Similarly, the courts which have indicated that punitive damages are recoverable under ERISA have articulated varying standards to support punitive awards, ranging from "outrageous conduct," *see Kann v. Keystone Resources, Inc.*, 575 F. Supp. 1084, 1094 (W.D. Pa. 1983), to conduct which is "sufficiently willful, malicious, or outrageous," *see Eaton v. D'Amato*, 581 F. Supp. 743, 748 (D.D.C. 1980), to the Ninth Circuit's standard of "actual malice or wanton indifference," *see Winterrowd v. David Freedman and Company*, 724 F.2d 823, 826 (9th Cir. 1984).

While awards of punitive damages have traditionally been premised upon conduct which is found to be "malicious," "willful" or "wanton," these standards have been perceptibly lowered, permitting courts to award punitive damages against a defendant whose conduct can be characterized, at most, by some heightened degree of negligence.[21] Consequently, there is little uniformity among

[21] *See* note 20, *supra*. Application of these "standards" is necessarily imprecise, given the uncertainty surrounding the definitions of such terms as "malice," *see Smith v. Wade*, 461 U.S. 30, 38-41 and n.6, and given the blurred distinctions between terms like

the broad range of standards used to assess punitive damages, and many of these standards are phrased in such vague and evasive terms that they provide no real guidance to courts and juries. *See* Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 So. Cal. L. Rev. 1, 34-37 (1982).[22]

Similarly vague are the standards used for determining the amount of punitive damages to be assessed against

"willful," "wanton," "reckless disregard" and "conscious indifference." *See* Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 So. Cal. L. Rev. 1, 34-37 (1982). Moreover, the difficulty of distinguishing between conduct which is "reckless" as opposed to merely "negligent" leads inevitably to inconsistent and imprecise applications of these standards. As stated by one author:

> Unfortunately, the distinction between recklessness and negligence relates to no clear behavioral standards in the real world .... It is truly striking how we have devised a system that is not far removed from a lottery for deciding such grave matters —with the draw determined by not only the predilections of the presiding judge, but the emotions of the jury sitting in the case.

Rabin, *Dealing with Disasters: Some Thoughts on the Adequacy of the Legal System*, 30 Stan. L. Rev. 281, 297 (1978).

[22] In an opinion certifying Montana law to a Federal district court, the Supreme Court of Montana recognized this uncertainty in the area of punitive damages. *See First Bank (N.A.)-Billings v. Transamerica Insurance Co.*, 679 P.2d 1217 (Mont. 1984). In concluding that insurance coverage of punitive damages does not violate Montana's public policy, the court noted that "juries and judges typically award punitives for a broad range of conduct not often described as willful or wanton, but as merely reckless or unjustifiable." *Id.* at 1222. Refusing to preclude such insurance coverage in light of the uncertainty in the area of punitive damages, the court further stated that "fact-finders ... wrestle with concepts like recklessness and reasonableness, such that defendants may not know that their conduct constituted presumed malice until after trial, and that a defendant in one case may never know the sting of punitive damages while another defendant in a similar case may be faced with financing a sizeable award." *Id. See also Sinclair Oil Corporation v. Columbia Casualty Company*, 682 P.2d 975 (Wyo. 1984).

a defendant. This amount is generally left to the sole discretion of the jury, guided only by certain ill-defined factors relating to the nature of the defendant's misdeed and the wealth of the defendant.[23] The lack of standards and, indeed, of rationality, for assessing punitive damages has prompted members of this Court to comment on the arbitrary and prejudicial nature of punitive damages awards. As Justice Powell stated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1973):

> In most jurisdictions jury discretion and the amounts [of punitive damages] awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.

See also Smith v. Wade, 461 U.S. 30, 57-65, 92-94 (dissenting opinions of Justices Rehnquist and O'Connor); *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 50-51 (1979).

The lack of standards for assessing punitive damages, coupled with the unbridled discretion of judges and juries, raises serious questions as to the constitutionality of these damages as they have now been expanded and extrapolated, and of the procedures for awarding them. *See* Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269 (1983). The due process clauses of the Fifth and Fourteenth Amendments mandate that procedures in civil cases be rational and fair. *Mathews v. Eldridge*, 424 U.S. 319 (1976). Yet the procedures employed in punitive damages actions fail to comply with the simplest concept of fundamental fairness. No unique procedures have been established to protect a defendant in a punitive damages action from the risk that such damages will be improperly awarded, based upon the whim or caprice of a judge

[23] *See* Restatement (Second) of Torts § 908(2) and comment e (1979).

or jury. This often results in an arbitrary and erroneous deprivation of property, or in the stigma which necessarily attaches to a defendant whose conduct is characterized as "malicious" or "wanton".[24] Even if punitive damages are allowed, additional procedural safeguards, such as an elevated standard of proof, limitations on the amounts of punitive damages and bifurcation of punitive damages trials, could be established. This would be likely to reduce the extent of error and prejudice, but few courts have required such procedures.

In addition, even though punitive damages actions are nominally civil, they exemplify characteristics which are inherently criminal. Contrary to the fundamental view that damages are awarded in civil actions to compensate victims for injuries suffered, punitive damages are essentially penalties assessed against defendants to *punish* certain conduct and to *deter* others from engaging in similar acts. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350; *see also Smith v. Wade*, 461 U.S. 30, 58 (dissenting opinion of Justice Rehnquist). Unlike criminal actions, however, punitive damages actions provide none of the constitutional protections accorded to criminal defendants, including proof beyond a reasonable doubt, protection against double jeopardy, *Brady* rules, and the privilege against self-incrimination. *See Smith v. Wade*, 461 U.S. at 59 (dissenting opinion of Justice Rehnquist).[25]

[24] The interests of fiduciaries in ERISA actions in avoiding these erroneous assessments of substantial punitive awards outweigh the interests of beneficiaries who are made whole when all benefits owed to them are fully paid. In a statement which is especially applicable to this case, Justice Rehnquist stated:

> It is anomalous, and counter to deep-rooted legal principles and common-sense notions, to punish persons who meant no harm, and to award a windfall, in the form of punitive damages, to someone who already has been fully compensated. These peculiarities ought to be carefully limited—not expanded to every case where a jury may think a defendant was too careless, particularly where a vaguely defined, elastic standard like "reckless indifference" gives free reign to the biases and prejudices of juries. In short, there are persuasive reasons not to create a new punitive damages remedy unless it is clear that Congress so intended.

Smith v. Wade, 461 U.S. at 87-88.

These constitutional infirmities inhere in the Ninth Circuit's decision below permitting the award of punitive damages against plan fiduciaries for breaches of their duties. The decision below provides no workable standards for determining when, and in what amounts, punitive damages should be awarded in actions under ERISA. The decision below thus invites courts to assess potentially unfair and excessive punitive damages against errant fiduciaries, and creates a substantial risk that punitive damages awards will be altogether inappropriate based upon the circumstances of a particular case. By adopting the position that punitive damages are unavailable in actions under ERISA, this Court can halt the expansion of the unfair, unworkable and, we submit, unconstitutional, punitive damages doctrine into the field of employee benefits.

[25] This difference exists despite the fact that punitive damages defendants are often subjected to "damage" awards greatly in excess of the maximum criminal penalties which can be assessed for similar conduct. *See* Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 U. Va. L. Rev. 269, 279 (1983). Indeed, even though the maximum financial criminal penalty available under ERISA for "willful" interference with employee rights is $10,000, *see* 29 U.S.C. § 1141, punitive awards against a fiduciary, based upon the same "willful" standard, have been upheld in amounts significantly greater than the statutory maximum. *See Winterrowd v. David Freedman and Co.*, 724 F.2d 823 (9th Cir. 1984) (upholding $75,000 punitive damages award against defendant on the basis of a standard requiring a showing of "actual malice or wanton indifference to the rights of a participant or beneficiary").

CONCLUSION

For the reasons set forth above and for the additional reasons advanced in the Brief for the Petitioners, the decision below should be reversed.

Respectfully submitted,

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